SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1113

LEE WAY MOTOR FREIGHT, INC., *Petitioner*,

v.

MARCUS JONES, ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

In their brief in opposition to petitioner's writ of certiorari which was filed with the Court on January 22, 1971, respondents have presented arguments which, we believe, tend to obscure the important issue with respect to which petitioner has sought review by this Court.

Contrary to respondents' assertions (Brief in Opposition pp. 5-6), petitioner *does not* herein argue that present employment practices which tend to perpetuate the effects of past discrimination are exempt from attack under Title VII. What petitioner does question, however, is the propriety of the Tenth Circuit's application of the "present effects" doctrine to strike down racially neutral employment practices which are founded on admittedly legitimate business purposes, where, as in this case, the court's conclusion of "past discrimination" (*i.e.*, discriminatory hiring) rests exclusively on statistics evidencing a pre-Act racial imbalance in the employer's workforce.

Nor are respondents correct in that suggestion that petitioner is contending that "statistical evidence may not be used to establish violations of Title VII." (Brief in Opposition p. 7). Quite to the contrary, petitioner concedes that such statistics are significant and relevant factors to be considered in civil rights cases. The question raised by petitioner is not whether "statistics often tell much," *State of Alabama* v. *United States*, 304 F.2d 583, 586 (1962), *aff'd per curiam* 371 U.S. 37 (1962), but rather whether statistics *standing alone tell enough* to warrant a conclusion of unlawful discrimination.

Insofar as respondent suggests that racial statistics alone are a legally sufficient basis for concluding unlawful discrimination, the cases cited (Brief in Opposition pp. 7-8) are inapposite. In each of those cases, with the exception of *Parham* v. *Southwestern Bell Telephone Co.*, — F.2d — (8th Cir. 1970), 3 CCH Emp. Prac. Dec. ¶ 8021, statistics comprised only one element of the sum total of the evidence relied upon.

Thus, the Tenth Circuit's decision in this case and that of the Eighth Circuit in *Parham*, which was decided after this case, are unique with regard to their treatment of statistics as dispositive of the issue of discrimination.

The decision of the Tenth Circuit erects a standard for proof of discrimination which presumes most employers to have been guilty in the past. It also imposes a test for determining the lawfulness of present employment practices which an employer cannot satisfy by showing that such practices were initiated and are maintained for good business reasons. Consequently, the Tenth Circuit decision represents a major threat to the legality and stability of employment practices throughout the country. It places in doubt the validity of employment practices whenever minority workers have not been employed in proportion to their percentage in the local work force despite the fact that the practices admittedly have been instituted and applied for legitimate business reasons and without regard to race. Thus, the action of the Tenth Circuit provides precisely the kind of preferential treatment Congress expressly declared was not required by Title VII of the Civil Rights Act of 1964.

As noted by the Tenth Circuit, (Petition p. 7a), the Court's finding of discriminatory hiring is the *essential premise* to its ultimate conclusion that petitioner's no-transfer policy unlawfully perpetuates the effects of past discrimination. To the extent that the essential premise for the court's finding is based solely on the statistical evidence of racial imbalance, it represents a precedent of dubious merit and broad national consequence and thus warrants review by this Court.

CONCLUSION

For the foregoing additional reasons, the petition should be granted.

Respectfully submitted,

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